Supreme Court, U. S.
FILED
MAR 25 1977
MICHAEL RODAK, JR., CLERK

No. 76-1030

In the Supreme Court of the United States

OCTOBER TERM, 1976

STATE OF MINNESOTA, BY ITS ATTORNEY GENERAL, WARREN SPANNAUS, AND ITS POLLUTION CONTROL AGENCY, APPELLANT

v.

CLIFFORD L. ALEXANDER, JR., SECRETARY OF THE ARMY, ET AL.

ON APPEAL FROM, AND ON PETITION FOR A WRIT OF CERTIORARI TO, THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO DISMISS OR AFFIRM, AND BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 2

Statement 2

Argument 4

Conclusion 13

CITATIONS

Cases:

California ex rel. State Water Resources Control Board v. *Environmental Protection Agency*, 511 F. 2d 963, reversed on other grounds, 426 U.S. 200 6

E. I. duPont de Nemours & Co. v. *Train*, No. 75-978, decided February 23, 1977 11

Environmental Protection Agency v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200 ..... 3, 8-9

Gibbons v. *Ogden*, 9 Wheat. 1 6

Hancock v. *Train*, 426 U.S. 167 ..... 3, 5, 6

Helvering v. *New New York Trust Co.*, 292 U.S. 455 8

Kern-Limerick, Inc. v. *Scurlock*, 347 U.S. 110 6

Kokoszka v. *Belford*, 417 U.S. 642 8

Paul v. *United States*, 371 U.S. 245 6

Page

Cases-continued

Richards v. *United States*, 369 U.S. 1 8

Swift & Co., Inc. v. *Wickham*, 382 U.S. 111 5

Statutes, rules and regulations:

Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. (Supp. V) 1251 *et seq.*:

Section 301(a), 33 U.S.C. (Supp. V) 1311(a) 7

Section 306(c), 33 U.S.C. (Supp. V) 1316(c) 10

Section 313, 33 U.S.C. (Supp. V) 1323 ..... 2, 3, 8, 9

Section 401, 33 U.S.C. (Supp. V) 1341 ..... 7, 9

Sections 401-405, 33 U.S.C. (Supp. V) 1341-1345 7

Section 401(a)(6), 33 U.S.C. (Supp. V) 1341(a)(6) 10

Section 402(a), 33 U.S.C. (Supp. V) 1342(a) 7, 9

Section 402(b), 33 U.S.C. (Supp. V) 1342(b) 3, 7

Section 402(c), 33 U.S.C. (Supp. V) 1342(c) 7

Section 404, 33 U.S.C. (Supp. V) 1344 ..... *passim*

Section 404(a), 33 U.S.C. (Supp. V) 1344(a) 7

Page

Statutes, rules and regulations-continued

Section 404(b), 33 U.S.C. (Supp. V) 1344(b) 7, 9, 12

Section 404(c), 33 U.S.C. (Supp. V) 1344(c) 8, 9

Section 511(a), 33 U.S.C. (Supp. V) 1371(a) 10

River and Harbor Act of 1970, Section 123(i), 84 Stat. 1824, 33 U.S.C. 1165a(i) 13

47 Stat. 55 2

74 Stat. 482 2

28 U.S.C. 1254(1) 5-6

28 U.S.C. 1254(2) 5

28 U.S.C. 2103 6

28 U.S.C. 2281 5

Rules of the Supreme Court of the United States:

Rule 16(1) 5

Rule 16(1)(a) 5

33 C.F.R. Part 209 12

33 C.F.R. 209.145(e) 12

33 C.F.R. 209.145(f)(vii) 12

40 C.F.R. Part 230 12

40 C.F.R. 230.1(b)(2) 12

40 C.F.R. 230.4-230.5 12

Page

Statutes, rules and regulations-continued

Minn. Reg. WPC 15(c)(3) 2

Minn. Reg. WPC 15(c)(6) 2

Minn. Reg. WPC 15(c)(13) 2

Minn. Reg. WPC 15(d) 2

Miscellaneous:

H.R. Doc. No. 150, 86th Cong., 1st Sess. (1959) 2

H.R. Doc. No. 290, 71st Cong., 2nd Sess. (1930) 2

A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (Committee Print, 1973) 10, 11

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OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A-24 to A-45) is reported at 543 F. 2d 1198. The opinion of the district court (J.S. App. A-11 to A-23) is reported at 401 F. Supp. 524.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1976 (J.S. App. A-45 to A-46). A notice of appeal to this Court was filed on January 4, 1977 (J.S. App.

A-46 to A-47). On January 26, 1977, the State of Minnesota filed in this Court a jurisdictional statement. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2), or, alternatively, under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Water Pollution Control Act Amendments of 1972 render the dredging operations of the United States Army Corps of Engineers, performed in navigable waters of the United States for the purpose of maintaining navigation, subject to state regulation.

STATEMENT

Appellant brought this action against the Secretary of the Army and certain subordinates in the United States Army Corps of Engineers asking the district court to declare that Section 313 of the Federal Water Pollution Control Act Amendments of 1972 (hereafter the FWPCA Amendments), 86 Stat. 875, 33 U.S.C. (Supp. V) 1323, required the Corps of Engineers in performing its dredging operations to comply with state water pollution control laws and regulations (J.S. App. A-10). Appellant alleged (J.S. App. A-6 to A-10) that discharges of "dredged spoil" from certain dredging operations of the Corps of Engineers[1] violated state effluent limitations[2] and state water quality standards.[3] Appellant

[1]In particular, the complaint referred to dredging in the Mississippi River and in Duluth Harbor (J.S. App. A-3). The Corps of Engineers is under a statutory duty to maintain a 9-foot channel for the Mississippi River (see 47 Stat. 55 and H.R. Doc. No. 290, 71st Cong., 2d Sess. (1930)) and a 28-foot channel for Duluth-Superior Harbor (see 74 Stat. 482 and H.R. Doc. No. 150, 86th Cong., 1st Sess. (1959)).

[2]See Minn. Reg. WPC 15(c)(3) and WPC 15(c)(6) (J.S. App. A-6 to A-7).

[3]See Minn. Reg. WPC 15(c)(13) and WPC 15(d) (J.S. App. A-8 to A-9).

also claimed that those discharges violated state law requiring disposal permits.

The Corps of Engineers denied appellant's jurisdiction over its dredging operations, and argued that Congress, in Section 404 of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1344, specifically established a separate permit program for the disposal of dredged spoil to be administered by the Secretary of the Army, and thus continued the Corps' traditional immunity from state regulation in the performance of functions essential to the maintenance of navigation.

The district court (J.S. App. A-11 to A-23) held that Section 313 was an unqualified requirement that the Corps of Engineers comply with state water pollution control laws, including state permit requirements. The district court concluded that Section 404 was inapplicable when a State had a National Pollutant Discharge Elimination System (NPDES) program approved by EPA under Section 402(b) of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1342(b), as did the State of Minnesota.

On appeal, the court of appeals reversed. The court rejected the district court's conclusion that the Corps is required to obtain state discharge permits, since that conclusion conflicted directly with this Court's decision in *Environmental Protection Agency* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200 (J.S. App. A-27).[4] Appellant does not challenge that holding here (see J.S. 13). The court further held that the statutory scheme and the legislative history of the 1972 Amendments demonstrated that Congress did not intend to subject the

[4]The district court's decision was rendered before the decisions in the *Environmental Protection Agency* v. *California* case and in *Hancock* v. *Train*, 426 U.S. 167.

discharge of dredged spoil by the Corps of Engineers to state regulation, but intended that such discharges were to be regulated separately by the Secretary of the Army and the Administrator of the Environmental Protection Agency (J.S. App. A-28, A-44). The court rejected appellant's claim that its inability to regulate dredging by the Corps would have serious environmental consequences, since the Secretary's regulations, the Administrator's guidelines, and ongoing studies by the Corps are all designed "to assure that all discharges of dredged material result in the least environmental harm possible" (J.S. App. A-44). The court concluded (J.S. App. A-44 to A-45) that:

> the overriding concern of the Congress in this context was for the maintenance of unimpeded traffic in the navigable waters of the United States. Regulation by the various States of the Union, each with its own requirements, could result in a conceivably chaotic situation as riverborne traffic moved from the boundaries of one state to those of another. We find no authorization of such state regulation in the legislative history of the Act or its several sections. We hold that Congress did not intend a subordination of the federal power and authority in this area to State control.

ARGUMENT

The precise question presented here is whether the FWPCA Amendments subject to state regulation a specific activity—the discharge of dredged spoil—by a particular federal agency—the Corps of Engineers—in the course of a particular function—maintaining the navigable servitude of the United States. There is no conflict among the circuits on this question and the court of appeals correctly concluded that Congress, by separately vesting the regulation of that

particular activity in the Secretary of the Army and the Administrator of EPA, did not intend to subject that activity to the vagaries of state regulation. Further review of this issue is not warranted.

1. Pursuant to Rule 16(1)(a) of the Rules of this Court, appellees move to dismiss the appeal on the ground that it is not within the jurisdiction of the Court under 28 U.S.C. 1254(2), which provides for appeal only when a state statute has been held "invalid as repugnant to the Constitution, treaties or laws of the United States * * * ."[5] The principal issue in this case involves the interpretation of a federal statute, and appellant does not claim, nor did the court of appeals hold that any state statute was invalid as repugnant to the federal statute. By holding that the federal statute did not waive the traditional immunity of the Corps of Engineers from state regulation, the court implicitly held that the purported reach of state laws over the Corps' dredging activities was invalid under the Supremacy Clause; but claims of that nature are not within the scope of Section 1254(2). See *Swift & Co., Inc.* v. *Wickham*, 382 U.S. 111, where the Court held that federal preemption decisions, although grounded in the Supremacy Clause, did not give rise to three-judge court jurisdiction under 28 U.S.C 2281. See also *Hancock* v. *Train*, 426 U.S. 167, where claims similar to appellant's were reviewed by writ of certiorari.

Review of the judgment below therefore may properly be secured only by a writ of certiorari pursuant to 28 U.S.C.

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[5]If the Court should conclude that it has jurisdiction to entertain an appeal, we move in the alternative that the judgment below be summarily affirmed. See Rule 16(1) of the Rules of this Court.

1254(1). The Court should therefore treat the jurisdictional statement as a petition for a writ of certiorari. See 28 U.S.C. 2103; see also J.S. 3, n. 3.

2. The FWPCA Amendments do not render the dredging activities of the Corps of Engineers subject to state regulation.

As the court of appeals recognized (J.S. App. A-39), the inquiry whether a federal statute has waived the constitutional immunity of federal activities from state control and regulation must proceed from the basic premise, reaffirmed by this Court in *Hancock* v. *Train*, 426 U.S. 167, 179,[6] that:

> [b]ecause of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate" that makes this authorization of state regulation "clear and unambiguous."

Those principles have particular force with respect to federal activities maintaining commercial navigation on interstate waterways, since the federal "power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government * * *." *Gibbons* v. *Odgen*, 9 Wheat. 1, 190.

In the FWPCA Amendments of 1972, Congress vested both the procedural and substantive regulation of dredging activities of the Corps of Engineers exclusively in the

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[6]Quoting from *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 122; *Paul* v. *United States*, 371 U.S. 245, 263; *California ex rel. State Water Resources Control Board* v. *Environmental Protection Agency*, 511 F. 2d 963, 968 (C.A. 9), reversed on other grounds, 426 U.S. 200.

Secretary of the Army and the Administrator of EPA, not in the States.

Sections 401-405, 33 U.S.C. (Supp. V) 1341-1345, establish a permit system for the discharge of pollutants; discharges without a permit are prohibited. See Section 301(a), 33 U.S.C. (Supp. V) 1311(a). Under Section 402(a), the permit system is administered initially by the EPA Administrator on the basis of effluent limitations and standards of performance established by him. States participate in the permit program in two principal ways. First, Section 401 requires "[a]ny applicant for a Federal license or permit" to obtain a certificate from the State in which the discharge will originate that the discharge will comply with, *inter alia*, both state and federal effluent limitations, if any. Second, Section 402(b) allows States to administer their own permit programs if the Administrator approves their programs as adequate to insure compliance with certain standards and requirements. When a state program becomes operative, the federal permit program is suspended with respect to the waters subject to the state program. Section 402(c).

However, Section 404(a) provides:

> The Secretary of the Army, acting through the Chief of Engineers, may issue permits * * * for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

Section 402(a) makes clear that the Secretary of the Army has the exclusive authority to issue permits for the discharge of dredged spoil, since Section 402(a) begins "[e]xcept as provided in * * * Section 404 * * * the Administrator may * * * issue a permit * * * ." Section 404(b) directs the Secretary of the Army to specify disposal sites "through the

application of guidelines developed by the [EPA] Administrator, in conjunction with the Secretary of the Army * * * ." In addition, Section 404(c) authorizes the Administrator to veto a specified disposal site "whenever he determines * * * that the discharge * * * will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." Before exercising his veto, however, the Administrator is required to consult with the Secretary of the Army.

In short, Section 404 not only vests permit issuing authority for dredged spoil disposal in the Secretary of the Army, it also establishes the substantive criteria on which that authority is to be exercised.

Appellant's claim rests primarily on the language of Section 313,[7] which appellant contends constitutes an unambiguous waiver of the Corps' immunity from state regulation (J.S. 11-14). That argument reads Section 313 in isolation from the remainder of the statute, which, when properly viewed in its entirety,[8] reflects Congress' intention that the dredging activities of the Corps of Engineers shall be subject exclusively to procedural and substantive regulation by the Secretary of the Army, acting in conjunction with the EPA Administrator.

Our position is supported by this Court's analysis of the statutory scheme in *Environmental Protection Agency* v.

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[7]Section 313, 33 U.S.C. (Supp. V) 1323, provides in part that "[e]ach department, agency, or instrumentality of * * * the Federal Government * * * shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements * * *."

[8]See *Kokoszka* v. *Belford*, 417 U.S. 642, 650; *Richards* v. *United States*, 369 U.S. 1, 11; *Helvering* v. *New York Trust Co.*, 292 U.S. 455, 464-465.

California, supra. There the Court held that Section 313 does not impose upon any federal instrumentality, including the Corps of Engineers, state permit requirements. The Court recognized that under the statutory scheme, the EPA Administrator retains responsibility under Section 402(a) for ensuring federal compliance with substantive state requirements by issuing permits to federal instrumentalities which comply with state standards embodied in EPA-approved NPDES programs. 426 U.S. at 219-220. But with respect to the disposal of dredged spoil by the Corps of Engineers, Sections 402(a) and 404 make clear that the Administrator has no authority to issue permits. That authority is vested in the Secretary of the Army, who is specifically directed to exercise it by applying "guidelines developed by the Administrator, in conjunction with the Secretary of the Army"—and not by applying state requirements embodied in EPA-approved NPDES programs. Section 404(b).[9] In short, the statute is significantly devoid of any means by which state requirements may be imposed on the Corps of Engineers' dredging activities—in contrast to other activities of other federal instrumentalities. The substantive requirements that govern the issuing of permits for the disposal of dredged spoil by the Corps of Engineers are federally developed and federally administered requirements.[10]

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[9]Moreover to the extent that Section 404(c) authorizes the Administrator to exercise his veto over the designation of disposal sites, it directs him to consider specific criteria set forth in that section and to consult with the Secretary of the Army; it provides no role for state requirements embodied in state NPDES programs.

[10]In this respect, the statute distinguishes between the Corps of Engineers and private dredgers. Private dredgers must obtain a disposal permit from the Secretary of the Army, and as "applicant[s] for a Federal license or permit," are required by Section 401 to obtain a certificate from the State that the discharge will comply with statutory

Moreover, any uncertainty with respect to Congress' intent should be dispelled by the express language of Section 511(a), 33 U.S.C. (Supp. V) 1371(a), which states that "[t]his Act shall not be construed as * * * affecting or impairing the authority of the Secretary of the Army * * * to maintain navigation * * *."

In summary, contrary to appellant's contention, the FWPCA Amendments do not constitute the kind of clear and unambiguous waiver of the Corps' immunity from state regulation which fundamental principles of federalism require; indeed they manifest precisely the opposite intent.

3. As the court of appeals correctly held, the legislative history of the FWPCA Amendments confirms that Congress did not intend to subject to state regulation the disposal of dredged spoil by the Corps of Engineers in the course of maintaining navigation on interstate waterways. Perhaps the clearest explication of the intent of Section 404 is reflected in the discussion of an amendment to the Senate version of the Amendments introduced by Senator Ellender. Senator Ellender's amendment was virtually identical to Section 404 as ultimately enacted (see J.S. App. A-32; 2 Leg. Hist. at 1386)[11]; as he explained the purpose of his amendment (2 Leg. Hist. at 1386-1387):

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requirements, including standards of performance established by the State. See Section 306(c), 33 U.S.C. (Supp. V) 1316(c). However, Section 401(a)(6) provides that "[n]o Federal agency shall be deemed to be an applicant for the purposes of this subsection."

[11]"Leg. Hist." refers to the two volumes of the legislative history of the 1972 FWPCA Amendments, entitled A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (Committee Print, 1973), which the Library of Congress has compiled.

> One of the main deficiencies of [the reported] bill is that it treats dredged materials the same as industrial waste, sewage, sludge, or refuse introduced into a river system, lake, estuary or ocean. The disposal of dredged material does not involve the introduction of new pollutants; it merely moves the material from one location to another. * * *
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> * * * * *
>
> [Under the Ellender amendment] [t]he Secretary of the Army will not be obligated to require strict compliance with the effluent requirements established by the Environmental Protection Agency in issuing permits. The strict adherence to the published standards would result in 90 percent of the ports and harbors of the United States being closed, until such time as land disposal areas are provided. This would create a catastrophical situation with respect to our foreign and domestic commerce.

In opposing the amendment, Senator Muskie, described as "perhaps the Act's primary author",[12] said "What Senator Ellender's amendment would do would be to exempt dredging" (J.S. App. A-33; 2 Leg. Hist. at 1388).

Although the Senate did not adopt Senator Ellender's amendment, the version of Section 404 that emerged from the Conference Committee and that was ultimately enacted reflected the substance of the amendment, with the additional provisions that the Secretary of the

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[12]*E.I. duPont de Nemours & Co.* v. *Train*, No. 75-978, decided February 23, 1977, slip op. 16.

Army, in issuing permits, was to apply guidelines developed by the Administrator in conjunction with the Secretary, that the Secretary could consider "the economic impact * * * on navigation and anchorage" if the guidelines alone would prohibit the specification of a disposal site, and that the Administrator could veto site specifications. Moreover, as the court of appeals noted (J.S. App. A-34, A-37 to A-38), the House and Conference Committee reports both echoed Senator Ellender's concern that the FWPCA Amendments were not unreasonably to impair "dredging activities essential for the maintenance of interstate and foreign commerce."

4. The guidelines[13] promulgated pursuant to Section 404(b) of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1344(b), by the EPA Administrator in conjunction with the Secretary of the Army, and the regulations[14] published by the Chief of Engineers implementing Section 404 demonstrate that the decision of the court of appeals does not free the Corps of Engineers from environmental constraints in conducting necessary dredging operations. The guidelines develop evaluation criteria[15] for *all* proposed discharges of dredged and fill material, and these criteria are expressly applicable to the Corps of Engineers.[16] Before the Corps of Engineers undertakes any dredging project, a "statement of findings" is prepared in which the guidelines and regulations are applied to its projects.[17] The Corps of Engineers is also conducting a

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[13]40 C.F.R. Part 230.

[14]33 C.F.R. Part 209.

[15]See 40 C.F.R. 230.4-230.5.

[16]40 C.F.R. 230.1(b)(2); see also 33 C.F.R. 209.145(e).

[17]33 C.F.R. 209.145(f)(vii).

comprehensive study of the environmental effects of the disposal of dredged material, which is known as the Dredged Material Research Program and which is authorized by Section 123(i) of the River and Harbor Act of 1970, 84 Stat. 1824, 33 U.S.C. 1165a(i). The knowledge gained from this program, as it becomes available, is being applied in implementing Section 404 to assure that all discharges of dredged and fill material, including those from the Corps' own projects, result in the least environmental harm possible.

CONCLUSION

For the reasons stated, the appeal should be dismissed and, treating the appeal as a petition for a writ of certiorari, the petition should be denied.

Respectfully submitted.

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MARCH 1977.

DOJ-1977-03